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Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and Associated Forces - The First Year*, 30 Pace L. Rev. 340 (2010).

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Jeffrey F. Addicott*

*"The views of men can only be known, or guessed at, by their words or actions."*¹

George Washington, 1799

When Senator Barack Obama ran for President of the United States in the 2008 election against Senator John McCain,² his major campaign slogans were based on a cry for "change."³ Of course, even the novice student of political science knows that the promise of change crops up during practically every presidential campaign in American history

* Distinguished Professor of Law and Director, Center for Terrorism Law, St. Mary's University School of Law. B.A. (with honors), University of Maryland; J.D., University of Alabama School of Law; LL.M., The Judge Advocate General's Legal Center and School; LL.M. (1992) and S.J.D. (1994), University of Virginia School of Law. This article was prepared under the auspices of the Center for Terrorism Law located at St. Mary's University School of Law, San Antonio, Texas. The author wishes to acknowledge with special thanks the superb efforts of research assistants John Hicks and Shanna Castro who supported this article with outstanding research and editing.

1. THE QUOTABLE FOUNDING FATHERS 199 (Buckner F. Melton, Jr. ed., 2004) (statement by George Washington to Patrick Henry, Jan. 15, 1799).

2. Obama won fifty-three percent—versus McCain's forty-six percent—of the popular vote; Obama won 365 electoral votes to McCain's 173; and Obama won twenty-eight states while McCain won twenty-two. See CNN.com, President—Election Center 2008, <http://www.cnn.com/ELECTION/2008/results/president/> (last visited Feb. 5, 2010).

3. Two of Obama's campaign slogans were: "Change We Can Believe In" and "Change We Need." See Presidential Campaign Slogans, <http://www.presidentsusa.net/campaignslogans.html> (last visited Feb. 5, 2010).

and then quickly fades into oblivion once the winner takes office.⁴ In short, there really is no change. Indeed, in terms of dealing with the threat of militant Islam posed by al-Qa'eda, the Taliban, and associated forces, there can be little question that in the first year of his presidency, Obama actually retained many key Bush Administration policies. Although his efforts to portray his policies as somehow different played well with the main-stream media headlines of the day,⁵ President Obama was largely ineffective in setting a clear departure from the policies of the Bush Administration. If anything, Obama sowed more confusion than Bush.⁶ For instance, President Obama's promised change to provide a so-called "new and comprehensive strategy for Afghanistan and Pakistan"⁷ to address the threat of militant Islam took over ten months and resulted in the adoption of a Bush-styled "surge" (used in the Iraq War) to simply deploy an additional 30,000 troops on the ground in Afghanistan. His campaign-era idea to send American troops to Pakistan where the main al-Qa'eda structure has reconstituted never materialized.⁸

The purpose of this monograph is to provide a brief overview of what President Obama did during his first year in office *vis-à-vis* developing a coherent legal and policy strategy

4. See generally, e.g., JACK W. GERMOND & JULES WITCOVER, *MAD AS HELL: REVOLT AT THE BALLOT BOX*, 1992 (1993) (quoting George H.W. Bush, Acceptance Address before the Republican National Convention (Aug. 18, 1988)). At the 1988 Republican National Convention, President H.W. Bush promised, "Read my lips: no new taxes." *Id.* Bush subsequently raised taxes for the 1990 fiscal year in response to the beginning of a recession.

5. Deborah Howell, *An Obama Tilt in Campaign Coverage*, WASH. POST, Nov. 9, 2008, at B6 (admitting that there was a distinct media slant towards Obama during the campaign, and citing the number of positive stories about Obama versus the number of positive stories about McCain). See also *Fox News Watch* (Fox television broadcast Apr. 4, 2009), available at <http://www.foxnews.com/story/0,2933,512768,00.html>.

6. See, e.g., John Dickerson, *The Fog of War*, SLATE, Dec. 1, 2009, <http://www.slate.com/id/2237100/> (noting that Obama's speech detailing deployment of more troops while setting a deadline for the withdrawal of troops was confusing); Stephen Dinan, *Troops Confused, Republicans Say*, WASH. TIMES, Jan. 12, 2010, at 5 (indicating Obama's policies are confusing to deployed troops).

7. See President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009), http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress.

8. See *Obama Says He Might Send Troops to Pakistan*, MSNBC.COM, Aug. 1, 2007, <http://www.msnbc.msn.com/id/20070536>.

for dealing with al-Qa'eda, the Taliban, and associated forces. In addition, the article will provide analysis on the efficacy of those actions from a national security perspective.

I. Bush Policies on Al-Qa'eda, the Taliban, and Associated Forces

Following the al-Qa'eda terror attacks of September 11, 2001,⁹ the Bush Administration embarked on a series of antiterrorism policy and legal initiatives designed to disrupt the Islamic terror organization (and its affiliates) and to prevent future terror attacks against the homeland. Over the span of the Bush presidency, a wide variety of sweeping changes were instituted, including: the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USAPATRIOT Act);¹⁰ the creation of the Department of Homeland Security;¹¹ the passage of a much strengthened Foreign Intelligence Surveillance Act;¹² the creation of military

9. On September 11, 2001, 19 members of the radical Islamic terror group al-Qa'eda hijacked four U.S. passenger aircraft while in flight (five terrorists each in three of the planes and four in the fourth). *See generally* Evan Thomas, *A New Date of Infamy*, NEWSWEEK, Sept. 13, 2001, at 22 (setting out a timeline of events that occurred on September 11, 2001). The Islamic terrorists intentionally crashed two of the planes into the Twin Towers of the World Trade Center in New York City. *See Terrorists Destroy World Trade Center, Hit Pentagon in Raid With Hijacked Jets*, WALL ST. J., Sept. 12, 2001, at A1. A third plane crashed into the Pentagon in Washington, D.C., but the fourth plane went down in a field in Pennsylvania, most likely as a result of the heroic efforts of some of the passengers. *Id.* According to a *New York Times* tally, along with billions of dollars in property loss, approximately 3,000 were killed, not including the nineteen terrorists. *See A Nation Challenged*, N.Y. TIMES, Apr. 24, 2002, at A13.

10. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USAPATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The bill passed in the Senate by a vote of 98-1. 147 CONG. REC. S11059-60 (2001). The House of Representatives passed their version by a vote of 357-66. 147 CONG. REC. H7224 (2001).

11. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (establishing the Department of Homeland Security in response to the September 11, 2001 terrorist attacks, with the purpose of consolidating the executive branch organizations related to homeland security under one Cabinet level agency).

12. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007).

commissions;¹³ and the establishment of a new combatant command, the United States Northern Command, in Colorado.¹⁴ The United States also used military force to unseat the Taliban regime in Afghanistan.¹⁵ In turn, confinement facilities were established to detain certain unlawful enemy combatants captured in Afghanistan and other parts of the world at Bagram Air Force Base, Afghanistan and at Guantanamo Bay, Cuba.¹⁶

In short, understanding that the one-dimensional use of the criminal justice system was unable to deal with an ideology of religious-based hate able to recruit tens of thousands of followers and field terrorist cells throughout the world, the Bush Administration employed a combination of traditional law enforcement tools, e.g., criminal investigations and federal prosecutions, with the more muscular use of military force applied under the law of war.¹⁷ The most significant and

13. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *amended by* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190 (to be codified in scattered sections of 10 U.S.C.) (creating military commissions, in response to the *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), decision, and with the stated purpose “[t]o authorize trial by military commission for violations of the law of war, and for other purposes.”).

14. About U.S. Northern Command, <http://www.northcom.mil/About/index.html> (last visited Feb. 5, 2010) (explaining that U.S. Northern Command (“USNORTHCOM”) was established on October 1, 2002 in response to the September 11, 2001 terrorist attacks).

15. Philip Smucker et al., *The Good, Bad, and Unfinished*, CHRISTIAN SCI. MONITOR, Jan. 7, 2002, at 1 (discussing Afghanistan).

16. See Joint Task Force Guantanamo, <http://www.jtftgmo.southcom.mil/> (last visited Feb. 5, 2010). The mission of the U.S. military task force is to conduct “safe, humane, legal and transparent care and custody of detainees, including those convicted by military commission and those ordered released.” *Id.* Bagram Air Force Base is the largest detention facility. It currently holds over 750 people. See *Afghanistan to Take Over Bagram Prison*, ABCNEWS.NET.AU, Jan. 10, 2010, <http://www.abc.net.au/news/stories/2010/01/10/2789002.htm>.

17. The central international treaty dealing with the law of war or the law of armed conflict is the 1949 Geneva Conventions. The Geneva Conventions are set out in four categories: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; (3) Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III];

crucial legal development advanced by the Bush Administration was the clear view that the conflict with al-Qa'eda was a real "war,"¹⁸ to be fought not only with the use of domestic federal criminal law, but also with the full power of the legal rules associated with the law of war. Among other things, the premise that the United States was at war served as the justification for the rule of law to designate and then detain certain enemy combatants without trial, establish the use of military commissions, and interrogate enemy combatants.

A. *The War on Terror*

The first action taken following the September 11 attacks was the Bush Administration's pronouncement that the United

and (4) Geneva Convention Relative to the Protections of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The goal of the law of war is to mitigate the accompanying evils of war by: "(a) Protecting both combatants and noncombatants from unnecessary suffering; (b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and (c) Facilitating the restoration of peace." U.S. DEPT OF ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE ¶ 2 (1956).

18. Although many trace the origin of al-Qa'eda's declaration of war on the United States to 1996 or earlier, the key declaration of war from the perspective of the radical Islamic group was made on February 22, 1998, when Osama bin Laden and the "World Islamic Front" formally issued a religious fatwa urging all Muslims to engage in physical violence against "Crusaders and Jews." PETER L. BERGEN, *THE OSAMA BIN LADEN I KNOW* 196 (2006). Signed by Sheikh Osama bin-Muhammed bin Laden, Ayman al Zawahiri, Abu-Yasir Rifa'i Ahmad Taha, Sheikh Mir Hamzah, and Fazlur Rahman, the declaration proclaimed:

All these crimes and sins committed by the Americans are a clear declaration of war on Allah, his messenger, and Muslims. And *ulema* (clerics) have throughout Islamic history unanimously agreed that the jihad is an individual duty if the enemy destroys Muslim countries.

On that basis, and in compliance with Allah's order, we issue the following fatwa to all Muslims:

The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the holy mosque [Mecca] from their grip.

Id.

States was at “war.”¹⁹ In tandem with this determination from the Commander in Chief, the phrase “War on Terror” entered the lexicon of both the general public and all branches of the government, where it remained firmly set for the next seven years.²⁰ Although the phrase was not accurate in what it purported to describe (terrorism is a tactic, not an entity), it certainly met the publicists’ twin requirements for public consumption—it was short and to the point. Nevertheless, unlike the so-called “War on Poverty”²¹ or “War on Drugs,”²² the “War on Terror” was never designed to be a metaphor, but rather a label for a *real* war waged under the law of armed conflict.²³ Just as the phrase “World War II” failed to identify the enemy (Germany, Japan, and Italy), so did the phrase “War on Terror.” In other words, if the United States viewed this conflict as a *real* war, who was the enemy? Obviously, the enemy was not *all* terror groups, of which the United States

19. See President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> (stating that “On September 11th, enemies of freedom committed an act of war against our country.”).

20. Some top officials in Bush’s Cabinet, including Defense Secretary Donald Rumsfeld, tried to replace the phrase “Global War on Terror” with “Global Struggle Against Violent Extremism.” General Richard Myers, Chairman of the Joint Chiefs of Staff, seemed to agree with the change, citing the image of troops as the solution when the situation was coined as a “war.” See Eric Schmitt & Thom Shanker, *New Name For “War on Terror” Reflects Wider U.S. Campaign*, N.Y. TIMES, July 26, 2005, at A7. On August 3, 2005, President Bush publicly overrode the attempted change in terminology by firmly stating, “[m]ake no mistake about it, we are at war,” and using the phrase “War on Terror,” at least five times, but never employing the newly coined phrase of his senior administration officials. See Richard W. Stevenson, *President Makes It Clear: Phrase is “War on Terror”*, N.Y. TIMES, Aug. 4, 2005, at A12 (quoting George W. Bush, Address at the American Legislative Exchange Council (Aug. 3, 2001)).

21. Special Message to the Congress Proposing a Nationwide War on the Sources of Poverty, 1963-64 PUB. PAPERS 375, 375-80 (Mar. 16, 1964) (transcript of Lyndon Johnson’s declaration of The War on Poverty).

22. On July 14, 1969, President Richard Nixon identified drug abuse as a “serious national threat” in a special message to Congress. Special Message to the Congress on Control of Narcotics and Dangerous Drugs, 1969 PUB. PAPERS 513, 513 (July 14, 1969). Two years later, in June 1971, he declared “war” on drugs, characterizing drug addiction as “public enemy number one.” Remarks About an Intensified Program for Drug Abuse Prevention and Control, 1971 PUB. PAPERS 738, 738 (June 17, 1971).

23. See Joint Task Force Guantanamo, *supra* note 16. The law of war is also known as the law of armed conflict.

has currently designated only forty-four as Foreign Terrorist Organizations.²⁴ Further, the enemy was not all *Islamic* terror groups either, of which there were scores, including the very large terror organizations of Hamas²⁵ and Hizballah.²⁶

The U.S. Congress rapidly identified the enemy in the “War on Terror” as all those “nations, organizations, or persons”²⁷ responsible for the September 11 attacks. As such, on September 14, 2001, Congress voted unanimously (save one Congresswoman from California)²⁸ to authorize the President to use armed force against those “he determines planned, authorized, committed, or aided the terrorist attacks” against the United States.²⁹ Shortly thereafter, on September 20, 2001, President Bush issued an Address to Congress and the American people citing al-Qa’eda and the nations that support that “radical network of terrorists” as the enemies in the United States’s War on Terror.³⁰

Prior to the 2003 American-led military campaign against Iraq, the Bush Administration attempted to expand the meaning of the phrase “War on Terror” to include those rogue States who posed a threat to the United States by means of possessing or seeking to possess weapons of mass destruction. For instance, in 2002, President Bush said: “[t]he United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.”³¹

24. The Secretary of State, in accordance with federal law, is required to provide an annual report to Congress on terrorism, to include the designation of Foreign Terrorist Organizations (FTOs). 22 U.S.C. § 2656(f) (2006). The most current *Country Reports on Terrorism* was published on April 30, 2009 and identified forty-four terrorist groups. U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2008, at 283-84 (2009), available at <http://www.state.gov/documents/organization/122599.pdf>.

25. U.S. DEP’T OF STATE, *supra* note 24.

26. *Id.* at 283, 296-97, 299-301.

27. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

28. Congresswoman Barbara Lee of California voted “nay.” 147 CONG. REC. H5683 (2001). Ten others did not cast votes. *Id.*

29. 115 Stat. at 224.

30. See President George W. Bush, Address, *supra* note 19.

31. President George W. Bush, State of the Union Address (Jan. 29, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>. See also David E. Sanger, *Bush, Focusing on Terrorism, Says Secure U.S. is Top Priority*, N.Y. TIMES, Jan. 30, 2002, at A1.

Most certainly, the 2003 war with Saddam Hussein's Iraq was waged with this maxim in mind.³² Still, with the end of the international armed conflict in Iraq, the War on Terror settled back to its more limited meaning, to serve as the description of the ongoing global armed conflict between the United States of America and al-Qa'eda, the Taliban, and associated forces.³³ Congress specifically codified this definition of the enemy with the Military Commissions Act (MCA) of 2006.³⁴ While the combat activities in Iraq and Afghanistan after the summer of 2003 did not constitute armed conflict with a specific State,³⁵

32. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498, 1498-99 (2002) (codified at 50 U.S.C. § 1541 (2006)). The Authorization cited many factors to justify the use of military force against Iraq, including that alleged weapons of mass destruction and programs to develop such weapons posed a "threat to the national security of the United States," *id.* at 1498, and Iraq's "capability and willingness to use weapons of mass destruction against other nations and its own people," *id.* at 1499.

33. See President George W. Bush, Address, *supra* note 19 ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.").

34. In the Military Commissions Act of 2006, Congress specifically defined unlawful enemy combatants to include:

[A] person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or . . . a person who, before, on, or after the date of enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2601, *amended by* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190 (to be codified at 10 U.S.C. § 948a).

35. The actual period of a state of international armed conflict in both military engagements was measured in months. The military campaign against the Taliban regime took approximately three months, from October 7, 2001 until December 22, 2001, when Hamid Karzai took control of Afghanistan as Chairman of the Afghan Interim Authority. See U.S. Dep't of State, *Background* Note: Afghanistan, <http://www.state.gov/r/pa/ei/bgn/5380.htm> (last visited Feb. 5, 2010). The military campaign against Saddam Hussein's Iraq took less than two months, from March 20, 2003 to May 1, 2003, when President Bush declared an end to major combat operations in Iraq on the *U.S.S. Abraham Lincoln*. See *Bush Declares Victory in Iraq*, BBCNEWS.COM, May 2, 2003,

U.S. policy continued to require that its armed forces abide by the spirit and principles of the law of war on all military contingency operations.³⁶

B. *Designating and Detaining Enemy Combatants*

In conjunction with the War on Terror, the Bush Administration designated certain individuals as enemy combatants and detained them indefinitely. Under the law of armed conflict, an enemy combatant—whether lawful or unlawful—can be held indefinitely until the war is over.³⁷ The purpose of detention is not penal in nature, but necessary to keep the enemy combatant from rejoining enemy forces and continuing to fight.

The Bush Administration determined that the al-Qa'eda and Taliban fighters were not lawful enemy combatants, and hence not eligible for Prisoner of War (POW) status under the Third Geneva Convention.³⁸ Since al-Qa'eda fighters belonged to a terrorist organization and were not recognized members of an armed force, they were deemed unlawful belligerents.³⁹ The

http://news.bbc.co.uk/2/hi/middle_east/2989459.stm.

36. U.S. DEP'T OF DEF., DIRECTIVE 5100.77: DoD LAW OF WAR PROGRAM (1998), *available at* <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d510077p.pdf> (replaced by U.S. DEP'T OF DEF., DIRECTIVE 2311.01E: DoD LAW OF WAR PROGRAM (2006), *available at* <http://www.dtic.mil/whs/directives/corres/rtf/231101x.rtf>).

37. Traditional law of war authority allows the government to hold enemy combatants until the end of hostilities. *See* Geneva Convention III, *supra* note 17, art. 118.

38. *See supra* note 34 (providing the Military Commissions Act definition of “unlawful enemy combatant.” The Act also defined a lawful enemy combatant as a person who is:

[A] member of the regular forces of a State party engaged in hostilities against the United States; . . . a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or . . . a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

120 Stat. at 2601.

39. U.S. DEP'T OF ARMY, *supra* note 17, ¶ 60(b) (indicating that “[p]ersons

Administration determined that captured Taliban fighters were likewise not entitled to POW status under the Third Geneva Convention, in part because of their failure to comply with the Convention's applicable provisions of international law.⁴⁰

Throughout the Bush Administration's tenure, the Supreme Court never overturned the premise that the United States was engaged in a state of war with al-Qa'eda, the Taliban, and associated forces. Therefore, the United States was entitled to detain such fighters as enemy combatants.⁴¹ The Court instead considered narrow issues dealing with status and review processes applicable to detainees in Guantanamo Bay. The Court held in *Hamdan v. Rumsfeld* that, although the detainees were not entitled to POW status, Common Article 3 of the Geneva Conventions did in fact apply to the detainees at Guantanamo Bay.⁴² In 2008, a bitterly divided (5-4) Supreme Court held in *Boumediene v. Bush* that aliens designated as enemy combatants and detained at Guantanamo Bay had the constitutional privilege of habeas corpus review of the legality, as well as possibly the circumstances, of their detentions.⁴³ Significantly, then, the question to the federal district court is whether there is enough evidence for the government to designate a particular detainee

who are not members of the armed forces, as defined in [the Geneva Conventions], who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population").

40. Under the Third Geneva Convention, POW status is only conferred on persons who are "[m]embers of the armed forces of a Party to the conflict" or "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party . . . provided that such . . . fulfill" four conditions: "that of being commanded by a person responsible for his subordinates; . . . that of having a fixed distinctive sign recognizable at a distance; . . . that of carrying arms openly; [and] that of conducting their operations in accordance with the laws and customs of war." Geneva Convention III, *supra* note 19, art. 4(a)(1)-(2). The fourth and final condition "require[s] lawful combatants to wear distinctive military insignia, i.e., uniforms which would make them distinguishable from the civilian population at a distance." Jeffrey F. Addicott, *Legal and Policy Implications For a New Era: The "War on Terror"*, 4 SCHOLAR 209, 240 (2002).

41. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (approving the detention of enemy combatants).

42. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

43. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

as an enemy combatant.⁴⁴ As in all previous decisions associated with the enemy combatant issue, the Supreme Court did not rule that the government had no authority to detain enemy combatants; it held only that detainees had the right of civilian review of their designation as enemy combatants.⁴⁵

C. *Military Commissions and Federal Courts*

Military commissions are non-Article III courts. They derive their authority from Congress's power to "define and punish . . . [o]ffenses against the Law of Nations."⁴⁶ Historically, military commissions have been used in a variety of settings when related to war.⁴⁷ The main benefit for the government is that the rules of evidence are relaxed to allow for the exigencies of war, e.g., hearsay may be admissible and evidentiary chain of custody rules are relaxed.⁴⁸ Although the Bush Administration moved quickly to establish military commissions in 2001 under Article II of the Constitution,⁴⁹ the Supreme Court's 2006 ruling in *Hamdan v. Rumsfeld* struck down the President's authority to establish military commissions to try illegal enemy combatants, and strongly indicated that such a special court had to be created by Congress, not the President.⁵⁰ That same year, Congress responded to the *Hamdan* decision by passing the MCA, which specifically authorized the creation of military commissions to try unlawful enemy combatants for a variety of criminal offenses, including war crimes.⁵¹ Under the Bush

44. *See id.*

45. *Id.*

46. U.S. CONST. art. I, § 8, cl. 10.

47. *See* Eugene R. Fidell, *The Trouble With Tribunals*, N.Y. TIMES, June 14, 2009, at WK8.

48. *See* Press Release, Duncan Hunter, House Armed Servs. Comm., Floor Statement on the Military Commissions Act (Sept. 27, 2006), available at <http://armedservices.house.gov/comdocs/pressreleases/9-27-06HunterFloorStatement.pdf>.

49. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

50. *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006) (citing *Ex parte Milligan*, 71 U.S. 2 (1866)).

51. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, amended by Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190 (to be codified in scattered sections of 10 U.S.C.).

Administration, three al-Qa'eda fighters were tried and sentenced by military commissions.⁵²

The Bush Administration also utilized federal criminal courts to prosecute members of al-Qa'eda, including Zacarias Moussaoui, the so-called twentieth terrorist in the 9/11 attacks,⁵³ and shoe bomber Richard Reid.⁵⁴ Clearly, the Bush Administration's use of the federal criminal court system to try some al-Qa'eda members, and not others, undermined the argument that the law of war was fully operational and that military commissions were the appropriate framework for prosecuting al-Qa'eda terrorists. Nevertheless, the discrepancy

52. David Hicks made a plea bargain prior to trial on March 26, 2007. Record of Trial at 513-20, *United States v. Hicks* (Military Comm'n, Apr. 19, 2007), *available at* <http://www.defense.gov/news/Mar2007/US%20v%20David%20Hicks%20ROT%20%28Redacted%29.pdf>. Salim Hamdan was found guilty of terrorism charges, Transcript of Record at 3942, *United States v. Hamdan* (Military Comm'n, Aug. 7, 2008), *available at* <http://www.defense.gov/news/22-24-part%201-Ham-5-7%20Aug%2008-FINAL-pgs%203891-4014%20Redacted.pdf>, and then sentenced by a U.S. military jury to five and one-half years on August 7, 2008, *id.* at 4174 *available at* <http://www.defense.gov/news/22-24-part%203-Ham-5-7%20Aug%2008-FINAL-pgs-4113-4182Redacted.pdf> (ordering a sentence of 66 months). Ali Hamza Ahmad Suliman al Bahlul was convicted of terrorism war crimes by a military commission and sentenced to life in prison on November 3, 2008. See *NYTimes.com*, *Ali Hamza Ahmad Suliman al Bahlul—The Guantanamo Docket*, <http://projects.nytimes.com/guantanamo/detainees/39-ali-hamza-ahmad-suliman-al-bahlul#1> (last visited Feb. 5, 2010).

53. Zacarias Moussaoui entered a guilty plea to charges that he conspired to hijack planes and fly them into the World Trade Center and the Pentagon. Trial Order, *United States v. Moussaoui*, No. 01-455-A (E.D. Va. 2005). See also *United States v. Moussaoui*, No. 06-4494, 2010 WL 9953, at *1-9 (4th Cir. Jan. 10, 2010) (discussing the procedural history); *Moussaoui Pleads Guilty to Terror Charges*, CNN.COM, Apr. 23, 2005, <http://www.cnn.com/2005/LAW/04/22/moussaoui/index.html>. At the sentencing stage of the three-year federal trial, a jury sentenced Moussaoui to life in prison without the possibility of parole instead of the death penalty, which the government was seeking. See *Moussaoui*, 2010 WL 9953, at *9-12. See also *Moussaoui Formally Sentenced, Still Defiant*, MSNBC.COM, May 4, 2006, <http://www.msnbc.msn.com/id/12615601/>.

54. Richard Reid was convicted of attempting to blow up American Airlines Flight 63 from Paris to Miami on December 22, 2001 with a makeshift bomb in his shoe. Trial Order, *United States v. Reid*, No. 02-cr-10013 (D. Mass. 2008). He was convicted of multiple life sentences in a federal district court in December 2003. See *id.* See also *United States v. Reid*, 369 F.3d 619, 619-20 (1st Cir. 2004) (discussing the procedural history); *Exchange Between Reid, Judge Follows Life Sentence*, CNN.COM, Dec. 6, 2003, <http://www.cnn.com/2003/LAW/01/30/shoebomber.sentencing/>.

could be partially justified because neither Moussaoui nor Reid was ever classified as an “enemy combatant.” In fact, scores of radical Islamic terrorists that did not qualify as enemy combatants have been tried in federal courts since 9/11.⁵⁵

D. *Interrogation of Detainees*

In terms of questioning detainees, the precise meaning of “enemy combatant” was pivotal for the Bush Administration. Article 17 of the Third Geneva Convention provides that POWs are only required to give their “surname, first names and rank, date of birth, and army regimental, personal or serial number, or failing this, equivalent information.”⁵⁶ POWs are not required to give any further information.⁵⁷

Since the Bush Administration determined that the Third Geneva Convention did not apply to the detainees, American authorities were entitled to conduct interrogations so long as they did not involve torture or ill-treatment.⁵⁸ With the passage of the Detainee Treatment Act in 2005, additional uniform standards for interrogations were set out which expressly prohibited cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency.⁵⁹ Then, in 2006, the Supreme Court held in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions did in fact apply to the detainees, and that it protected them from violence, outrages

55. See, e.g., Jena Baker McNeill & James Jay Carafano, *Terrorist Watch: 23 Plots Foiled Since 9/11*, HERITAGE FOUNDATION, July 2, 2009, <http://www.heritage.org/Research/HomelandSecurity/bg2294.cfm>.

56. Geneva Convention III, *supra* note 17, art. 17.

57. Article 17 provides the following: “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be *threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.*” *Id.* (emphasis added).

58. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention Against Torture] (setting forth the standards of treatment for all persons and the universal rejection of “torture and other cruel, inhuman or degrading treatment or punishment throughout the world”). The convention provides a clear definition of torture, although it is lacking any definition of “other cruel, inhuman or degrading treatment.” See *id.*

59. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2680, 2739-43 (2005).

on personal dignity, torture, and cruel, humiliating or degrading treatment.⁶⁰

On September 5, 2006, the Department of Defense (DOD) issued new military detainee and terror suspect treatment guidelines.⁶¹ In announcing the new rules, President Bush revealed that fourteen “high value” terror suspects had been transferred from undisclosed Central Intelligence Agency (CIA) locations to Guantanamo Bay.⁶² Further, the Bush Administration denied that any of the CIA detainees were subjected to interrogation techniques that had violated international or domestic law.⁶³ The so-called “waterboarding” interrogation technique, used repeatedly on three al-Qa’eda detainees in the CIA program, was determined to constitute a level of force that did not rise to the level of torture under the Torture Convention.⁶⁴ On July 20, 2007, President Bush issued Executive Order 13,440, which provided interpretation of Common Article 3 provisions as applied to interrogations conducted by the CIA.⁶⁵

II. Obama Policies on Al-Qa’eda, the Taliban, and Associated Forces

President Obama’s expressed desire to dismantle key elements of the Bush policies *vis-à-vis* al-Qa’eda, the Taliban, and associated forces began only days after taking the oath of office. Instead of creating an interagency task force to conduct a detailed study of all viable options and recommendations on how best to proceed in the War on Terror, the President issued

60. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006).

61. U.S. DEP’T OF DEF., DIRECTIVE 2310.01E, DoD DETAINEE PROGRAM (2006), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>.

62. See David Sanger, *President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, Sept. 7, 2006, at A1.

63. See *What Went Wrong: Torture and the Office of the Legal Counsel in the Bush Administration: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Jeffrey F. Addicott, Professor of Law, Center for Terrorism Law, St. Mary’s University School of Law), http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=7904.

64. See, e.g., *id.* (arguing that waterboarding as practiced by the CIA did not constitute torture under the Torture Convention).

65. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

executive orders mandating, what were billed as, sweeping changes in policy, and then established an interagency task force to study the consequences of his directives. In three executive orders issued on January 22, 2009, the President ordered: (1) the closure of Guantanamo Bay within one year;⁶⁶ (2) the suspension of all ongoing military commissions;⁶⁷ and (3) the suspension of the CIA's enhanced interrogation program.⁶⁸ Ironically, within one year of the announcement, two of the executive orders would be, for all practical purposes, functionally nullified.

A. *Overseas Contingency Operations*

Wishing to establish a new theme to describe the conflict with al-Qa'eda, the Taliban, and associated forces, President Obama took aim at the phrase most associated with President Bush's overall framework for dealing with the threat of al-Qa'eda-styled terrorism⁶⁹—the War on Terror.⁷⁰ The new phrase offered by the Obama Administration to describe the threat of al-Qa'eda transnational terrorism was the decidedly sterile "Overseas Contingency Operations."⁷¹

66. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009). *See also* Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009) (establishing a special task force on detainee disposition).

67. Exec. Order No. 13,492, 72 Fed. Reg. at 4899.

68. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

69. *See generally* JEFFREY F. ADDICOTT, TERRORISM LAW: MATERIALS, CASES, COMMENTS (5th ed. 2008).

70. *See* Daniel Dombey & Edward Luce, "Global War on Terror" Out of Lexicon, FIN. TIMES (London), June 30, 2009, at 4 (quoting Secretary of Homeland Security Janet Napolitano, who confirmed that "War on Terror" is not used because it "does not describe properly the nature of the terrorist threat to the US").

71. This phrase was first used in a memo to Pentagon staff members in late March 2009, which stated, "this administration prefers to avoid using the term 'Long War' or 'Global War on Terror' [GWOT.] Please use 'Overseas Contingency Operation.'" Scott Wilson & Al Kamen, "Global War on Terror" is Given New Name, WASH. POST, Mar. 25, 2009, at A4. For roughly a month prior to the memo, senior administration officials had been publicly using the latter phrase, including Peter Orszag, Director of the Office of Management and Budget, in reference to Obama's budget proposal ("The budget shows the combined cost of operations in Iraq, Afghanistan and any other overseas contingency operations that may be necessary."), and Assistant Secretary of the Air Force for Manpower, Craig W. Duehring ("Key battlefield monetary incentives has allowed the Air Force to meet the demands of overseas

Taken from the dictionary of military terminology,⁷² Section 101 of Title ten of the *United States Code* describes the phrase as follows:

The term “contingency operation” means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, retention on, active duty of members of the uniformed services . . . during a war or during a national emergency declared by the President or Congress.⁷³

Overseas contingency operations are also known as military operations other than war (MOOTW), and can encompass a wide range of actions to include: arms control, combating terrorism, Department of Defense support to counterdrug operations, enforcement of sanctions and maritime intercept operations, enforcement of exclusion zones, ensuring freedom of navigation and overflight, humanitarian assistance, military support to civilian authorities, nation assistance and support to counterinsurgencies, noncombat evacuation operations, peace operations, protection of shipping operations, recovery operations, show of force operations, strikes and raids, and support to insurgencies.⁷⁴

contingency operations even as requirements continue to grow.”). *Id.*

72. DOD Dictionary of Military Action and Associated Terms, http://www.dtic.mil/doctrine/dod_dictionary/ (follow “C,” “contingency operation”) (last visited Feb. 5, 2010).

73. 10 U.S.C. § 101(a)(13) (2006).

74. U.S. JOINT CHIEFS OF STAFF, MILITARY OPERATIONS OTHER THAN WAR: J-7 OPERATION PLANS AND INTEROPERABILITY DIRECTORATE 16-27 (1995), available at www.dtic.mil/doctrine/jrm/mootw.pdf. Military operations other than war (MOOTW) is the use of military capabilities for operations that fall short of actual war. These operations “focus on deterring war, resolving conflict, promoting peace, and supporting civil authorities in response to domestic crisis.” *Id.* at 2. There are six basic principles to MOOTW:

If Bush's "War on Terror" was considered to be non-descriptive by critics, Obama's "Overseas Contingency Operations" was both over- and non-descriptive at the same time. Predictably, the shelf life of the phrase "Overseas Contingency Operations" was measured in days and provided a lightning rod for those who believed that Obama was naïve or disoriented to the reality of the threat.⁷⁵ More importantly, however, the phrase was an abject rule of law failure because it did not include the word "war," the most critical element of all. Indeed, the very rule of law tools that the Obama Administration used during its first year in office—the use of deadly force by the military in combat (to include "drone" air strikes), the labeling of enemy combatants, the detention of said combatants without criminal charges, etc.—could only be conducted in a time of war. As such, Secretary of Homeland Security Janet Napolitano's remarks that the phrase "War on Terror" was abandoned because "[i]n some respects 'war' is too limiting,"⁷⁶ were grossly inaccurate. Without question, the use of the law of war expands, not restricts, the available legal powers necessary to deal with al-Qa'eda terrorism.⁷⁷

Historically, all labels for all wars that America has fought have included the word "war." This is a fundamental ingredient that provides the clearest signal that the nation is using the law of war and not operating outside the rule of law. In addition, from a public relations standpoint, Obama signaled added consternation to the American people: parents are more likely to understand that their son died in a war, rather than in an overseas contingency operation.⁷⁸ It was not until January

objective, unity of effort, security, restraint, perseverance, and legitimacy. *Id.* at 10.

75. See Joe Queenan, *War By Any Other Name*, WALL ST. J., Apr. 13, 2009, at A15. See also Judson Berger, *What's in a Name? Re-Branding Madness Consumes Washington*, FOXNEWS.COM, May 18, 2009, <http://www.foxnews.com/politics/2009/05/14/whats-branding-madness-consumes-washington>; Posting of Kailash Srinivasan to Policy Farm Team blog of the Roosevelt Institution, <http://rooseveltinstitution.wordpress.com/2009/04/14/obama%E2%80%99s-obfuscations-or-what-a-%E2%80%9Coverseas-contingency-operation%E2%80%9D-can-tell-us-about-the-modern-political-landscape/#more-834> (Apr. 14, 2009, 17:00 EST).

76. Dombey & Luce, *supra* note 70.

77. See Press Release, Duncan Hunter, *supra* note 48.

78. The Obama Administration has faced criticism for using the phrases

7, 2010, that President Obama produced a truly unequivocal statement that the U.S. was at “[W]ar against al-Qa’eda.”⁷⁹ Paradoxically, this statement was made only after the intense criticism of the Obama Administration following the arrest of al-Qa’eda member Umar Farouk Abdulmutallab for trying to detonate an explosive device on a U.S. aircraft on Christmas Day 2009.⁸⁰

B. *Designating and Detaining Enemy Combatants*

At one time, Guantanamo Bay had a peak population of over 700 detainees from approximately 40 countries, with Saudi Arabia, Afghanistan, and Yemen the most represented. When President Bush left office in January 2009, around 250 detainees remained.⁸¹ The individuals still held there during President Obama’s first year in office were detained under the same legal theory used by President Bush: under the law of war, they were detained as enemy combatants until either hostilities ceased or specific charges were levied against them in a military commission or, if they were U.S. citizens (like al-Qa’eda member Jose Padilla),⁸² in a federal court.⁸³ As of

“Overseas Contingency Operations” and the Orwellian-sounding “man-caused disasters,” in place of, respectively, the “War on Terror” and “acts of terrorism.” Queenan, *supra* note 75. Newly appointed Department of Homeland Security Secretary Janet Napolitano explained to the German news site, *Spiegel Online*, why she never used the word “terrorism” in her first testimony before the House Committee on Homeland Security: “In my speech, although I did not use the word ‘terrorism,’ I referred to ‘man-caused’ disasters. That is perhaps only a nuance, but it demonstrates that we want to move away from the politics of fear toward a policy of being prepared for all risks that can occur.” Interview by Cordula Meyer with Janet Napolitano, U.S. Sec’y of Homeland Sec. (Mar. 16, 2009) <http://www.spiegel.de/international/world/0,1518,613330,00.html>.

79. President Barack Obama, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), *available at* 2010 WL 40113 (“We are at war. We are at war against al Qaeda, a far-reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people, and that is plotting to strike us again. And we will do whatever it takes to defeat them.”).

80. See Mimi Hall, *Obama Orders Security Upgrade*, USA TODAY, Jan. 8-10, 2010, at 1A.

81. See *Brazil May Take Guantanamo Bay Detainees*, FOXNEWS.COM, Mar. 3, 2009, <http://www.foxnews.com/story/0,2933,504117,00.html>.

82. Padilla was convicted in a Florida federal court in 2008. Trial Order, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. 2008), 2008 WL

January 2010, just under 200 detainees remain at the facility.⁸⁴

Strangely, while President Obama was unwilling for most of his first year in office to publicly and unequivocally call the conflict with al-Qa'eda a "war," his Administration early on vigorously argued before the federal district court in *Al Maqaleh v. Gates*⁸⁵ that the conflict was in fact a war and that the Executive branch was entitled to detain indefinitely al-Qa'eda, Taliban, and associated enemy forces in Bagram Air Force Base, Afghanistan under the 2001 Congressional Authorization for Use of Military Force.⁸⁶ The only interesting legal difference advanced during the first year was the Obama Administration's weak attempt to subjectively distinguish between providing "support" and "substantial support" to al-Qa'eda, the Taliban, and associated enemy forces. Predictably, this distinction rang empty with at least two federal judges.⁸⁷

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83. See Washingtonpost.com, *Guantanamo Bay Timeline*, <http://projects.washingtonpost.com/guantanamo/timeline/> (last visited Feb. 5, 2010) ("[A] three judge panel then decides whether the detainee is an enemy combatant or if he is releasable.").

84. Donna Miles, *Morrell: U.S. Security Paramount in Detainee Determinations*, DEP'T OF DEF. DOC., Jan. 6, 2010, available at 2010 WLNR 320521. See also Posting of Michael Isikoff to Newsweek's Declassified blog, <http://blog.newsweek.com/blogs/declassified/archive/2010/01/06/guantanamo-is-not-ever-going-to-be-closed.aspx> (Jan. 6, 2010, 12:50 EST).

85. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), granting stay, granting motion to cert., 604 F. Supp. 2d 51 (D.D.C. 2009).

86. The statute states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

87. See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75-77 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24, 25-26 (D.D.C. 2009). In both cases the judges refused to accept the proposed differentiation of "support" versus "substantially supported." In the words of Judge Walton,

Replacing a standard that authorizes the detention of individuals who "support" an enemy organization with a standard that permits the detention of individuals who

In turn, President Obama's desire to close the detention facility at Guantanamo Bay never happened. In part, Obama's strong desire to close the facility met with a firestorm of opposition from the American people, including his own Democrat Party. Not only did the Democrat-controlled Congress refuse to provide the Obama Administration with the \$80 million it requested to close the facility, but Congress also placed numerous caveats on when, where, and how the President could transfer detainees, particularly if he wished to send them to the United States.⁸⁸

C. *Military Commissions and Federal Courts*

On June 8, 2009, President Obama first indicated that he intended to reverse course from his January 2009 Executive Order halting military commissions and would restart the process for alleged al-Qa'eda enemy combatant war criminals.⁸⁹ Of course, military commissions are only illegal unless the nation is, or has been, in a state of armed conflict under the law of war.⁹⁰ On the other hand, President Obama was quick to repeat and actually advance the Bush Administration's confusion regarding the appropriate judicial forum to prosecute al-Qa'eda enemy combatants for their crimes. Obama first did

“substantially support” that enemy doubtless strikes the casual reader as a distinction of purely metaphysical difference, particularly when the government declines to provide any definition as to what the qualifier “substantial” means.

Mattan, 618 F. Supp. 2d at 26 n.3 (quoting *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009)).

88. Shailagh Murray, *Senate Demands Plan For Detainees*, WASH. POST, May 20, 2009, at A1. See also Dafna Linzer & Peter Finn, *White House Weighs Order on Detention*, WASH. POST, June 27, 2009, at A1 (explaining that the appropriations bill signed by President Obama “forces the administration to report to Congress before moving any detainee out of Guantanamo and prevents the White House from using available funds to move detainees onto U.S. soil”).

89. The Obama Administration is contemplating multiple changes to the previous administration's use of military commissions, one of which would allow terror suspects at Guantanamo Bay to enter guilty pleas without going to trial. See Cam Simpson, *White House Plan Would Let Terror Suspects Plead Guilty*, WALL ST. J., June 8, 2009, at A4.

90. *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006).

this by directing the June 2009 transfer from Guantanamo Bay of one enemy combatant al-Qa'eda member to stand trial in New York federal district court to face murder charges for his role in the al-Qa'eda terrorist bombings in Africa in 1998.⁹¹ Then, in November 2009, the Obama Administration made the strange decision to prosecute Khalid Sheikh Mohammed and four other senior al-Qa'eda leaders in federal court in New York City.⁹² While President Bush could somewhat mask his confused decision about applying the proper rule of law to enemy combatants by asserting that the al-Qa'eda members that he had sent to federal district court—Zacarias Moussaoui and Richard Reid—had not been formally labeled as enemy combatants,⁹³ President Obama could not. All five of the al-Qa'eda members slated for trial in New York had been detained for years as enemy combatants. In addition, to make matters even more confusing, the announcement by the Obama Administration, disclosing that five enemy combatant (now termed “unprivileged enemy belligerent” by the Administration)⁹⁴ al-Qa'eda members—including Khalid Sheikh Mohammed—would be tried in federal district court, came in tandem with the announcement that another five enemy combatant al-Qa'eda members held at Guantanamo Bay would be tried by military commissions, caused a firestorm of debate and confusion.⁹⁵

91. Ahmed Ghailani was transferred to a New York District Court on June 9, 2009, despite bipartisan opposition in Congress. Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial*, WASH. POST, June 10, 2009, at A1. This was the first case of a non-American detainee from Guantanamo Bay transferred to U.S. soil to stand trial. *Id.* Ghailani pleaded not guilty to multiple charges in connection with the 1998 embassy bombings in Tanzania and Kenya. Transcript of Record, *United States v. Ghailani*, No. 98 Crim. 1023(LAK) (S.D.N.Y. 2009). *See also* *United States v. Ghailani*, No. 98 Crim. 1023(LAK), 2009 WL 3853799 (S.D.N.Y. Nov. 18, 2009) (discussing the procedural history); Finn, *supra*.

92. *See Prosecuting Terror*, BALTIMORE SUN, Nov. 17, 2009, at 20A.

93. *See supra* notes 54-55.

94. Section 1801 of the Military Commissions Act of 2009 uses the term “unprivileged enemy belligerents” in place of “unlawful enemy combatants.” Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801, 123 Stat. 2190, 2574-75 (to be codified at 10 U.S.C. § 948a). Although the language drops “the Taliban” and “associated forces,” it specifically lists al-Qa'eda as an unprivileged enemy belligerent. *Id.* at 2575.

95. *See Morning Meeting with Dylan Ratigan* (MSNBC television broadcast Nov. 13, 2009) available at <http://www.stmarytx.edu/ctl/> (television interview with Professor Jeffrey Addicott discussing the five al-Qa'eda

D. *Interrogation of Detainees*

President Obama made great fanfare of his January 2009 Executive Order halting CIA interrogations.⁹⁶ However, the CIA's high value al-Qa'eda detainees had long since been released and President Bush's 2007 Executive Order had already halted interrogation techniques that violated Common Article 3 of the Geneva Conventions.⁹⁷ President Obama's order was not a departure from the policy that was already in effect; DOD rules apply to all interrogations.⁹⁸

In reality, the most perplexing interrogation issue aired by the Obama Administration revolved around the waterboarding of three senior al-Qa'eda members in CIA custody under the Bush Administration. President Obama publicly asserted that waterboarding was torture but then refused to take any criminal action against those who authorized or carried out the technique.⁹⁹ Obama placed his Administration and himself in violation of international law because he was required under Article 7 of the Torture Convention to either extradite the alleged torturer or "submit the case to . . . competent authorities for the purpose of prosecution."¹⁰⁰ He refused to do either.

members to be tried in federal district court).

96. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

97. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

98. See Exec. Order No. 13,491, 74 Fed. Reg. at 4894.

99. *CIA Employees Won't be Tried for Waterboarding*, MSNBC.COM, Apr. 17, 2009, <http://www.msnbc.msn.com/id/30249847> (explaining that President Obama has told CIA operatives who engaged in waterboarding of suspected al-Qa'eda terrorists that they will not be prosecuted).

100. Convention Against Torture, *supra* note 58, at 198. Article 2 of the Torture Convention absolutely excludes the notion of exceptional circumstances to serve as an excuse for torture. "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *Id.* at 197.

III. Conclusion

*"We are at war. We are at war with al-Qa'eda."*¹⁰¹

Barack Obama

While other radical Islamic terrorists must be processed by domestic criminal law,¹⁰² the War on Terror is a real war against al-Qa'eda, the Taliban, and associated forces. As the Commander in Chief, it is imperative that President Obama communicate this fact with clarity to the American people and the world. Only then will he be able to provide clear and decisive leadership by matching the correct rule of law words with the proper deeds. Acting in accordance with the new discipline of "lawfare,"¹⁰³ legal clarity mandates that the President voice fewer platitudes about "change," particularly given the fact that, like all wars, it is not solely a matter of putting "steel on target," i.e., killing the enemy; it is a propaganda effort as well.

Unfortunately, President Obama's first year in office has been rubricated by confusion and frustration in a desire to somehow change Bush Administration policies. For instance, the Obama Administration's refusal to irrevocably and sternly tell the public that the conflict with al-Qa'eda terrorist forces was a "war" contrasted sharply with his simultaneous argument in federal court that al-Qa'eda fighters were in fact illegal enemy combatants subject to the law of war. This lack of clarity only provided fuel for America's enemies to perpetuate the false propaganda that the United States was acting illegally by, for example, detaining people without trial

101. President Barack Obama, Remarks, *supra* note 79.

102. As of the middle of November 2009, the confusion factor in the Obama Administration continued to multiply. President Obama had not yet produced a military strategy for Afghanistan and he refused to admit that the terror attack at Fort Hood, Texas, by Nidal Malik Hasan—the first significant terror attack in the United States since 9/11—was an act of Islamic terrorism. See Nancy Gibb, *Terrified . . . Or Terrorist?*, TIME, Nov. 23, 2009, at 26; Joe Klein, *The Mystery of the Surge*, TIME, Nov. 23, 2009, at 25.

103. See generally Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCE Q. 34 (2009) (arguing that leaders must appreciate the role that "lawfare" has to play in terms of the propaganda side of armed conflict).

in Guantanamo Bay.

Leadership skills rooted in the panacea of dialogue and a “see where it takes us”¹⁰⁴ approach in terms of national security are disastrous when confronting totalitarian fanatics. If the events of 9/11 have taught Americans anything, it is that the United States must operate under the law of war against those individual al-Qa’eda Islamic terrorists designated as enemy combatants. President Obama must put aside political partisanship and forcefully acknowledge the manifest fact that America is at war, and then institutionalize comprehensive policies that are fully rooted in the context of the law of war, not domestic criminal law. Many of these laws of war foundational policies—detaining enemy combatants, military commissions, interrogation—were developed during the Bush years and require only slight refinement, not change. Congress has provided some leadership with the passage of the 2009 Military Commissions Act,¹⁰⁵ but the Executive branch must assert leadership. If this means that President Obama must acknowledge successes in the previous Administration, then so be it. The nation is at war, the Commander in Chief must lead in accordance with that premise.

104. Barack Obama, Remarks at Press Conference (June 15, 2009) *available at* <http://www.whitehouse.gov/blog/issues/Foreign-Policy?page=9> (“We will continue to pursue a tough, direct dialogue between our two countries, and we’ll see where it takes us.”).

105. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190 (to be codified in scattered sections of 10 U.S.C.).